SINGAPORE REPORTS

OHBAYASHI-GUMI LTD. v. KIAN HONG HOLDINGS PTE. LTD.

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Thean JJ.) May 13, 1987]

[Singapore – Civil Appeal No. 63 of 1983]

Building Construction – Main contract – Sub-contract – Land reclamation project work – "Measure and value" contract – Correct method of measuring for payment – Method of work – Instruction drawings – Drawing volume measurement – Interpretation.

The appellant ("the Main Contractor") undertook under a lump sum contract to execute, complete and maintain for the Housing and Development Board ("the Employer") a major land reclamation project at the south-eastern foreshores of Singapore known as the East Coast Reclamation Scheme, Phase V (Telok Ayer Basin) Contract No. 4/22/74. The land reclamation required the erection of extensive granite bunds, which included the laying of filter cloth.

By a sub-contract dated July 13, 1974, the Main Contractor engaged the respondent ("the Sub-Contractor") to supply and place the required quantity of granite stones of the type as specified, to place the filter cloth supplied by the Main Contractor and to build some temporary drainage works.

The Sub-Contractor's letter of February 7, 1974, formed a part of the sub-contract. Paragraph (i) of the said letter was in these terms: "As your offer to H.D.B. is on an Alternative Design, our measurement for Class A & B stones shall be measured on pontoon before discharged by machine. Measurement for Rip-Rap shall be on constructed areas." It was common ground that the sub-contract was in the nature of a "measure and value" contract.

This appeal brought by the Main Contractor concerned the correct method of measuring for payment the quantity of granite stones used and the quantity of filter cloth laid. The arbitrator, by consent of both parties, referred the following three questions of law for determination by the High Court:

(1) Whether on a proper construction of the sub-contract, the price for supplying and placing Class A & B stones should be based on pontoon load measurement as the Sub-contractor contended, or on design volume measurement (*i.e.* measurement of the works done and materials supplied in accordance with the contract drawings and specifications) as the Main Contractor contended;

(2) Whether on a proper construction of the sub-contract, the price for laying the filter cloth should be based on the actual quantity of filter cloth supplied by the Main Contractor to the Sub-Contractor as the Sub-Contractor contended or on design area as the Main Contractor contended; and

(3) Whether on a proper construction of Part V clause 1 (iii)(b) of the sub-contract the Sub-Contractor had to pay for the cost of the filter cloth used in excess of 20 per cent over the 'designed area.'

All three questions involved the construction of the sub-contract. The High Court answered in favour of the Sub-Contractor all the three questions and the Main Contractor was ordered to pay the Sub-Contractor the aggregate sum of $2,068,272.06 and costs. The appeal was brought against those answers. No breach of contract had been suggested against the Sub-Contractor.

Held, dismissing the appeal: (1) having regard to the "measure and value" nature of the Sub-contract, the context of the various conditions of the sub-contract, the inevitable and unavoidable losses or wastage of stones owing to the underwater nature of the dumping works, the court were of the view that paragraph (i) of the Sub-Contractor's letter of February 7, 1974, was clearly intended to and did entitle the Sub-Contractor to be paid on the basis of measuring the Class A and Class B stones on the pontoons before their discharge into the areas designated for the building of the bunds. The Main Contractor therefore failed on this part of the appeal;

(2) the Sub-Contractor should be paid on the volume of cloth laid according to "shop drawings" issued by the Main Contractor to the Sub-Contractor. The High Court's decision on the second question was affirmed;

(3) accepting the submissions on behalf of the Sub-Contractor in respect of a clause ('the funny clause') of the sub-contract that there had been "very minimal accidental loss" of the filter cloth and that the "designated area" must mean the area to be laid in the event and as provided for by the "shop drawings," the court would also answer the third question in favour of the Sub-Contractor.

Cases referred to:

(1) *Gwyn* v. *Neath Canal Co.* (1868) L.R. 3 Ex. 209, 215.
(2) *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543.
(3) *Esmil Ltd.* v. *Fairclough Civil Engineering Ltd.* (1981) 19 Build. L.R. 129.

COURT OF APPEAL.

David Gardam Q.C. (*C.S. Wu* with him) for the appellants.

Patrick Garland Q.C. (*Cheng Tim Pin* with him) for the respondents.

Cur. Adv. Vult.

Lai Kew Chai J. (delivering the Judgment of the Court): The reclamation of land from the sea to which this appeal related required the erection of extensive granite bunds, which included the laying of filter cloth. The function of the bunds as built with the filter cloth was obviously to keep out the sea and to keep in the land fill. This appeal concerned the correct method of measuring for

payment the quantity of granite stones used and the quantity of filter cloth laid. With regard to the filter cloth laid, the further and third question arose as to whether the respondent was liable to pay for the value of filter cloth used in excess of 20 per cent over the "designed area." The High Court answered in favour of the respondent all three questions which the arbitrator referred to it by the consent of both parties under the Arbitration Act and the appellant was ordered to pay the respondent the aggregate sum of $2,068,272.06 and costs. Against those answers this appeal was brought before us.

The building of the bunds was part and parcel of a major land reclamation project at the south-eastern foreshores of Singapore and known as the "East Coast Reclamation Scheme, Phase V (Telok Ayer Basin) Contract No. 4/22/74" which the appellant (hereinafter referred to as "the Main Contractor") undertook to execute, complete and maintain for the Housing and Development Board (hereinafter referred to as "the Employer") for the lump sum of nearly $89 million under the main building agreement dated April 3, 1974. The main contract was accepted by both parties before us as a lump sum contract.

By a sub-contract dated July 13, 1974, the Main Contractor engaged the respondent (hereinafter referred to as "the Sub-Contractor") to supply and place the required quantity of granite stones of the type as specified, to place the filter cloth supplied by the Main Contractor and to build some temporary drainage works. We take care at this stage not to mention the consideration payable to the Sub-Contractor because its ascertainment shall provide the answers to the questions raised in this appeal.

So far as the nature of the sub-contract was concerned, it was common ground that it was a "measure and value" contract in contra-distinction to that of the main contract which, as we had earlier noted, was a lump sum contract. Accordingly, this distinction has to be borne in mind and great care has to be taken when one seeks to apply by incorporation any of the terms of the main contract to the sub-contract in pursuance of and so far as it is permitted by Clause 2 of Part II of the sub-contract. Under that clause, the terms and conditions of the main contract which were incorporated were those (1) which related to the 'Sub-Contract Works'; and (2) which were not repugnant or inconsistent with the sub-contract. The predominance of the sub-contract was emphasised by Clause 20 of the sub-contract by which it was agreed that in a conflict the terms of the sub-contract shall prevail over the terms contained in the main contract.

It is necessary to recite the factual background in which the sub-contract was concluded and to describe in some detail the sub-contract works undertaken by the Sub-Contractor before we turn to, as we must, the relevant provisions of the sub-contract which we have to construe. As to the background, one Mr. Kataoka of the Main Contractor met one Mr. Toh Kian Chuan of the Sub-Contractor in January 1974. This meeting was followed by a quotation submitted by the Sub-Contractor. A number of meetings between their representatives followed and they resulted in the Sub-Contractor sending to the Main Contractor two revised quotations in the form of two letters dated February 7, 1974, and April 15, 1974. These letters were subsequently incorporated in the sub-contract. As a particular paragraph in the letter of February 7, 1974, is of pivotal importance to the outcome of this appeal, we will return to it when we set out the relevant terms of the sub-contract. At this stage, we need merely note that the second quotation was about 4% less than the first quotation, that the quantities of materials to be supplied and work to be done in both the quotations remained essentially the same, and that the Sub-Contractor began work in May 1974, with the parties proceeding and working on the basis of the Sub-Contractor's letters of February 7 and April 15, 1974, until the sub-contract was signed on July 13, 1974.

With regard to the scope and nature of the sub-contract works, the layout of the extensive stone bunds to be built was marked out in a contract plan. Two sets of bunds were to be built. They were to be laid to the south-west of Clifford Pier where the Fill Site was described as "Fill Site B" and to the south-east of Clifford Pier where the Fill Site was marked as "Fill Site A." One of the principal contract drawings showed the "Typical Sections" of the stone bunds and of the sea-bed immediately below and in the way of the bunds to be built for Fill Site A and Fill Site B. Before the Sub-Contractor could begin any work, the sea-bed supporting and in the way of the bases of the stone bunds had to be prepared. A trench in that portion of the sea-bed had to be dredged down to and just below the 'firm to stiff layer' and filled with sand. The trench work was not the responsibility of the Sub-Contractor. The levels of the sand-filled channel would be measured by the

Employer. After the measurements, the Sub-Contractor was to place the filter cloth, which was a strong cloth made of polyvinylidene yarn of 0.553 mm. thickness, on top of the sand which would be more or less at sea-bed level except in the case of Fill Site B where the sand bed was elevated. The main contract required that the overlapping of the filter cloth shall not be less than one meter.

The next stage of the construction of the bunds would constitute the bulk of the Sub-Contractor's work. It had to supply by pontoons or iron barges "Class A stones" (which were specified as granite rock between the sizes of 100 kg. and 200 kg. per piece) and place them on top of the filter cloth to the satisfaction of the Superintending Officer appointed by the Employer until a bund was built and risen from the sea. To place these Class A stones, the pontoon loaded with these stones had to be positioned directly over the sea-bed where the stones were to be dumped. The stones were then pushed over the sides of the pontoon. When the bund was built up and it rose from the sea-bed to a height which got it in the way of the floating pontoon, the rest of the Class A stones were then placed in position by means of a floating crane.

The smaller "Class B stones" (which was specified as granite stones between the sizes of 0.2 metre and 0.1 metre) would then be placed on the landward slopes of the bunds on top of the Class A stones. After the placement of these Class B Stones on the landward slopes of the bunds, the filter cloth would be brought and placed round the landward 'toes' of the bunds and placed over the top of the Class B stones. In this way when the land fill material was dumped within the Fill Sites and it covered the landward slopes of the bunds such fill materials would be laid over or against the filter cloth which would prevent 'leaching' – a process by which soluble matter from the fill sites coming into the bunds was removed by sea water.

As to the seaward slopes of the stone bunds the Sub-Contractor was required to place filter cloth on top of the "Class A stones." And on top of the filter cloth, the Sub-Contractor was further required to supply and place stones referred to as "Rip Rap" which were uniformly graded facing stones of both Class A and Class B stones.

It has to be noted that the method of placing the stones to build the bunds from the sea-bed, which was adopted in this project, would have inevitably involved (1) the loss of stones which were carried away by sea currents; and (2) the dropping and placing of stones beyond or outside the design profiles of the bunds which could happen in spite of the Sub-Contractor's exercise of due care and skill, given the underwater nature of the work. The amount of waste material, which is the sum of the gross amount used minus the design/nett quantity, was found by the Arbitrator to be due to four phenomena, namely (1) erosion of materials caused by high flows from the Stamford Canal; (2) settlement of the foundations; (3) erosion by action of sea waves; and (4) erosion caused by movement of the elevated sand bed. In these circumstances, it is understandable why a "measure and value" instead of a lump sum sub-contract was chosen. However, it has to be stated that, no person could reasonably be expected to pay for any callous or wanton overdumping of the granite stones nor for any 'performance' which would be in breach of contract. The granite stones must be placed, as nearly as practicably possible, within the profiles of the bunds as designed and specified in the contract drawings. It is thus equally easy to understand, for example, the necessity for a provision such as the second paragraph of Clause 46 of the main contract which read as follows:–

> "Class 'A' stones as specified shall be dumped on the filter cloth and shall be built up as evenly as possible to the lines, levels and slopes on the Drawing."

It should also be noted that in this appeal no breach of contract has been even suggested against the Sub-Contractor. The Main Contractor has not in the course of the arbitration proceedings, in the High Court below or before us alleged any breach of any term of the sub-contract so far as the Sub-Contractor's execution of the works was concerned. It is therefore not the case that the Sub-Contractor is criticised for any unlawful overdumping of the stones or, consequentially, for the excessive use of the filter cloth which might have been in breach of any term of the sub-contract.

We must now set out the relevant provisions of the sub-contract. The sub-contract was divided into five parts which were named Parts I to V (both inclusive). It had an Appendix which set out a summary of eight documents, the seventh of which was the Sub-Contractor's letter of February 7, 1974. This letter was annexed to the Appendix and it is not disputed that the terms and conditions set out in the letter were accepted by the Main Contractor and they constituted a part of the sub-contract.

Parts I and II of the sub-contract provided:–

"PART I.

In consideration of the payments to be made by the Contractor to the Sub-Contractor as hereinafter mentioned, the Sub-Contractor hereby covenants with the Contractor to construct, complete and maintain as the Nominated Sub-Contractor mentioned in Clause 57 of the General Conditions of Contract in the Main Contract the works specified below and as shown in the specifications, on the drawings and other documents included in the Main Contract (hereinafter called 'the Sub-Contract Works'), on behalf of the Contractor, in conformity in all respects with the provisions of this Sub-Contract, and the Contractor hereby covenants to pay the Sub-Contractor in consideration of the construction, completion and maintenance of the Sub-Contract Works the following sum at the time and in the manner prescribed by this Sub-Contract.

PART I

1. (a) *Formation of Stone Bund comprising*

(1) Supply and Place of approximately 329,500 cubic metres of Class A Stone/rock according to all contract drawings and as specified @ $34.60 per cubic metre	S$11,400,700.00
(2) Supply and Place of approximately 21,870 cubic metres of Class B Stone/rock according to all contract drawings as specified @ $39.40 per cubic metre	861,678.00
(3) Placing of Filter Cloth of approximately 210,840 square metres according to all contract drawings and as specified @ $2.50 per square metre	527,100.00
(4) Supply and Place of approximately 13,450 cubic metres of Class "B" Stone/rock for Gabion according to all contract drawings and as specified @ 33.40 per cubic metre	449,230.00
(b) *Rip-Rap Facing*	
(1) Supply and Place of Rip-Rap approximately 48,940 cubic metres according to all contract drawings and as specified @ $28.60 per cubic metres	1,399,684.00
(2) Trimming Rip-Rap Facing of approximately 48,940 square metres according to all contract drawings and as specified @ 3.30 per cubic metre	161,502.00
(3) Placing of Filter Cloth of approximately 53,390 square metres according to all contract drawings and as specified @1.50 per square metre	80,085.00
(c) *Drainage Works*	
(1) Temporary Works Lump Sum	450,000.00
(2) Permanent Works Lump Sum	384,000.00
	$15,713,979.00
(d) Discount	200,000.00
Total Sum for the Sub-Contract	$15,513,979.00

2. The Sub-Contractor agrees to execute or omit to execute any item of the works mentioned above as ordered by the Employer or Contractor by way of measured variation at unit rate prices stated above. Quantities stated above shall not be taken to define or limit the extent of any work to be done by the Sub-Contractor in the execution and completion of the above Sub-Contract Works.

3. Save and except as provided herein, the Sub-Contractor shall provide all labour, material, constructional plant, temporary works and everything whether of a permanent or temporary nature required for the execution, completion and maintenance of the Sub-Contract Works.

PART II

1. *Notice of the Main Contract*

The Sub-Contractor hereby acknowledges to have notice and knowledge of all the provisions of the Main Contract including those provisions contained in the documents referred to in Appendix hereto and attached herewith except the detailed prices of the Contractor therein.

2. *Application and Incorporation of Terms of the Main Contract to the Sub-Contract*

All terms and conditions relating to the Sub-Contract Works contained in the Main Contract which are not repugnant or inconsistent with this Sub-Contract, shall apply and bind the Sub-Contractor under this Sub-Contract as if the same were severally set out herein."

The Sub-Contractor's letter of February 7 1974 was in two parts. The first part set out the quotation which, after deducting a discount of $200,000, was $15,513,979. The second part opened with the statement that the "Housing & Development Board contract will generally be applied unless otherwise specified below." Paragraph (i) "specified below" was in these terms:–

"As your offer to H.D.B. is on an Alternative Design, our measurement for Class A & B stones shall be measured on pontoon before discharged by machine. Measurement for Rip-Rap shall be on constructed areas."

As has been noted, the Main Contractor had agreed to supply the filter cloth "necessary for the sub-contract works": see Part V, clause 1(iii)(a) of the Contract. The Sub-Contractor had agreed to take delivery of the filter cloth ex the Main Contractor's stock-yard. With regard to the quantity of filter cloth to be used, both parties had entered into what, in the course of argument, was

described as a 'funny' or perplexing clause. The meaning of this clause is at the heart of the third question for the determination of the High Court. It is contained in Part V, clause 1(iii)(b) in the following terms:–

"An excess quantity of twenty per cent (20%) of filter cloth over the designed area will be carried in stock by the Contractor to allow for accidental loss. If the Sub-Contractor uses in excess of the 20% allowance made then any such excess over the 20% allowance shall be paid for by the Sub-Contractor."

The three questions of law posed for the determination of the High Court were as follows:–

(1) Whether on a proper construction of the sub-contract, the price for supplying and placing Class A & B stones should be based on pontoon load measurement as the Sub-Contractor contended, or on design volume measurement (*i.e.* measurement of the works done and materials supplied in accordance with the contract drawings and specifications) as the Main Contractor contended;

(2) Whether on a proper construction of the sub-contract, the price for laying the filter cloth should be based on the actual quantity of filter cloth supplied by the Main Contractor to the Sub-Contractor as the Sub-Contractor contended or on design area as the Main Contractor contended; and

(3) Whether on a proper construction of Part V clause 1 (iii)(b) of the sub-contract the Sub-Contractor had to pay for the cost of the filter cloth used in excess of 20 per cent over the 'designed area.'

All three questions involve the construction of the sub-contract. In doing so we should ascertain objectively the intention of the parties and in undertaking this task we are assisted by the principles of construing a contract. For the purpose of this appeal the first relevant principle is that the intention of the parties must be found within the four corners of the contract which must be construed as a whole, and also, as far as possible, to give effect to every part of it: see para 766 of Vol. 1 of *Chitty* on Contracts, 25th edn. The other relevant principle of construing a contract which we have to bear in mind, when we seek the answer to the third question before us, is that once we have ascertained the intention of the parties we are "bound to give effect to it by supplying anything necessary to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned" per Kelly C.B. in *Gwyn* v. *Neath Canal Co.*,[1] cited in para 785 of Vol. 1 of *Chitty* on Contracts, 25th edn. For a more modern example where words were rejected or ignored see *Nicolene Ltd.* v. *Simmonds*[2] and for a recent example where missing words were supplied see *Esmil Ltd.* v. *Fairclough Civil Engineering Ltd.*[3]

We turn to the first question concerning the correct method of measuring the granite stones supplied and placed by the Sub-Contractor, the answer of which will determine how much the Sub-Contractor should be paid. In the High Court, and in answer to the arguments of the Main Contractor fore us, it was contended on behalf of the Sub-Contractor that paragraph (i) of the Sub-Contractor's letter of February 7, 1974, already quoted earlier in this judgment, expressly provided that the "measurement for Class A and B stone shall be measured on pontoon before discharged by machine." This express term was heavily relied upon by the Sub-Contractor. Learned counsel emphasised that no other method of measurement of the granite stones was provided in the sub-contract. Learned counsel then drew attention to the second sentence of paragraph (i) of the said letter which provided thus: "measurement for Rip Rap shall be on constructed area." He pointed out that this provision touching on the measurement of the Rip Rap required reference to the Rip Rap as constructed which was unnecessary if the intention was merely to calculate the design volume from the drawings themselves. Part I of the sub-contract, which we have set out above, described the quantities as approximate. The arbitrator, however, found that they were the design quantities which the Main Contractor had earlier worked out for themselves, a matter quite unknown to the Sub-Contractor. Further, paragraph 2 of Part I of the sub-contract clarified that the "quantities stated above shall not be taken to define or limit the extent of any work to be done by the Sub-Contractor in the execution and completion of the above Sub-Contract Works."

In addition to the express provisions of the sub-contract which, it was contended, plainly indicated that parties had agreed to measure the granite stones supplied on pontoon loads, learned counsel for the Sub-Contractor stressed that it was not permissible to base and fix the quantities on all the contract drawings and "as specified" where, as here, the effect would be to convert what is admittedly a "measure and value" contract into a lump sum contract. Learned counsel also stressed that no breach of contract was alleged against the Sub-Contractor and that any contention that measurement by pontoon load would allow the Sub-Contractor to benefit from its own breach of contract indeed would beg the question whether it was in fact in breach of contract where, as here, none had been alleged against the Sub-Contractor.

The High Court accepted these arguments and

held that the price for supplying and placing the stones should be based on pontoon load measurement as the Sub-Contractor had contended. Learned counsel for the Main Contractor submitted that the High Court was wrong in its determination of the first question.

It was pointed out for the Main Contractor that according to the Arbitrator there had been considerable overdumping, although it was common ground that overdumping was by the underwater nature of the work wholly unavoidable. Learned counsel sought to explain the reasons why the quantities for both the stones and the filter cloth as stated in Part I, clause 1(a)(1), (2) and (3) of the sub-contract were approximations and why clause 2 in the same part provided that the quantities stated in clause 1 were "not to be taken to define or limit the extent of any work to be done by the Sub-Contractor in the execution and completion of the above Sub-Contract Works." Reference was made to clause 45 of the main contract which contemplated that the sand fill on the dredged trench were not intended to be absolutely level which necessarily meant that the design quantities had to be re-calculated based on the as-built levels. Learned counsel explained that this was the reason why the quantities stated in clause 1 of Part I of the sub-contract were in approximate figures and why it had to be provided that those approximate figures should not be taken to define or limit the sub-contract works.

However, the principal contention of the Main Contractor was that five conditions of or incorporated in the sub-contract indicated that the Class A and Class B stones were to be measured by design volume and that these five conditions of the sub-contract must prevail, as agreed in case of any inconsistency, over paragraph (i) of the letter of February 7, 1974, if and in so far as it purported to provide that the stones "shall be measured on pontoon before discharged by machine." As we set out the contentions of the Main Contractor bearing on each of the five conditions in the sub-contract, we will immediately following those contentions set out the respective submissions of the Sub-Contractor at the end of which we will then state our conclusions.

With regard to the first inconsistency the Main Contractor pointed out that under sub-clauses 1(a) and (b) of Part I of the sub-contract the Sub-Contractor had agreed to supply and place the stones and to place the filter cloth "according to all contract drawings and as specified." Since the arbitrator had found as a fact that the quantities so far as they were set out in Part I of the sub-contract were design quantities, which did not provide or cater for any stones overdumped or dumped outside the contract drawings, learned counsel for the Main Contractor urged us to accept the submission that the Main Contractor had agreed to pay and the Sub-Contractor had agreed to be paid on the basis of the design volume. However, on behalf of the Sub-Contractor it was contended that the "contract drawings" merely gave the levels and profiles of the bunds as designed and it was repeatedly stressed by learned counsel for the Sub-Contractor that such levels and profiles, including the design relationship of stones to filter cloth, cloth to fill, Class A stones to Class B stones, Rip Rap to Class B *etc.* might not be (as it was not in fact) achieved under-water. It was observed that the "contract drawings" did not themselves prescribe a method of measurement and this was a situation which one could understand, seeing that as between the Employer and the Main Contractor it was not necessary under a lump sum contract to measure as between themselves except for any variation for which the principles of the Standard Method of Measurement as provided in the main contract were to be used. The respective rights of the Contractor and the Sub-Contractor as between themselves under the "measure and value" contract, it was said, were quite different. What would be measured would be the actual work done which might differ from the design so long as the sub-contract works could be correctly described as works "properly executed" as required under clause 15 of the sub-contract.

Learned counsel for the Sub-Contractor also submitted that the expression "as specified" as quoted above was intended to regulate the type and size of the stones and how they were to be built up. Seen in that light, the expression was not to be taken as another construction pointer that the stones were to be measured by design volume.

The next inconsistency relied on by the Main Contractor was based on clause 11 of Part IV of the sub-contract. This clause provided that measurement of volumes or quantities agreed between the Employer and the Main Contractor or decided by the Employer as against the Main Contractor should be final and binding as between the Main Contractor and the Sub-Contractor. To this submission, learned counsel for the Sub-Contractor stressed that this clause had only limited use or operation as under the lump sum main contract

there would ordinarily be no measurement for the Class A and Class B stones except in the case of measurements for any variations. He emphasised that it would be very curious if the expressed intention of the parties to measure the stones on the pontoons before their discharge could be overridden by a clause in the main contract which by its lump sum nature had limited the scope of that clause.

As to the third inconsistency between paragraph (i) of the said letter and the provisions of the sub-contract the Main Contractor relied on clause 16 in Part IV of the sub-contracts which provided that claims for work done under the sub-contract were only payable if the same were payable under the main contract. The third paragraph of clause 16 provided that on "recovery of claims" from the Employer the Main Contractor shall pay the same to the Sub-Contractor less a fair proportion covering the Main Contractor's overhead costs and profits, not exceeding in any case 15% of the same. Learned counsel for the Sub-Contractor said that this interpretation of clause 16 would be patently inconsistent with clause 15 of the sub-contract (which regulated normal payments under the sub-contract) and paragraph (i) of the said letter which provided that the Sub-Contractor was to present bills to the Main Contractor for works executed on a monthly basis and that payment shall be made within 20 days after presentation of the bills. Accordingly the Sub-Contractor submitted to us that the "claims" under clause 16 must refer to matters such as disputed variations and that clause 16 not dealing with any method of measuring the stones could not be said to be in any conflict with paragraph (i) of the said letter.

The fourth inconsistency between paragraph (i) of the said letter and the provisions of the sub-contract requires some elaboration. Under this part of its case the Main Contractor made two assertions against the Sub-Contractor. First, it alleged that the Sub-Contractor had agreed through the incorporation of clause 55 in the main contract that the sub-contract works were to be measured according to the principles set out in the "Standard Method of Measurement of Civil Engineering Quantities (1968)" (hereinafter referred to as "the SMM"). Paragraph 13 of the SMM provided as follows:

"In the absence of special directions to the contrary, all measurements are to be net notwithstanding trade customs to the contrary, and without any allowance for wastage. Any method of measurement which form exceptions to this general direction are to be specially noted in the preamble to the bill of quantities or in the descriptions of the items affected."

In this part of its case, the Main Contractor contended that the Sub-Contractor had quoted for the job on the basis that all measurements were net, that is without any allowance for waste and loss through sea wave action or the other factors mentioned.

Secondly, by reason of the incorporation of clauses 46, 47 and 48 of the main contract specifications the Main Contractor asserted before us that the Sub-Contractor had in its tender for the job agreed to allow for losses of the stones and for the additional work of having to lay more filter cloth due to settlement, sea wave action and the other factors mentioned earlier. Having tendered on that basis, the Main Contractor contended that the Sub-Contractor was not permitted to rely on paragraph (i) of the said letter which was inconsistent with the sub-contract so far as clause 50 of the main conditions and clauses 46, 47 and 48 of the main contract specifications were concerned.

The Sub-Contractor's replies to these assertions may be briefly stated. It was pointed out that clause 55 expressly provided that the SMM shall apply "except where otherwise specifically prescribed." And it was in truth and in fact otherwise specifically prescribed by paragraph (i) of the said letter. Again, paragraph 13 of the SMM stated that "any method forming an exception (is) to be specifically noted." The Sub-Contractor claimed that the exception from the general principles of measurement was specially noted in paragraph (i) of the said letter. Finally, our attention was drawn to paragraph 47 of the SMM which provided that "the allowance for displacement, wave action or other source of waste" shall be separately stated. In the context of this "allowance," the Sub-Contractor claimed that what had happened in the respective tenders by the Main Contractor and the Sub-Contractor was this. As for the Main Contractor, it had allowed 30% to 40% waste when it submitted its quotation to the Employer. The Arbitrator had made this finding of fact on the basis of the Main Contractor's document known as "R8" containing the calculations of the quantities of the Main Contractor which were sent to its Head Office in Tokyo, Japan. The Main Contractor in quoting for a lump sum contract therefore had fully allowed for waste by adding to the quantities the estimated amount of waste. So far as the Sub-

Contractor was concerned it took care of the risk by stipulating in its "measure and value" contract for measuring the stones on pontoons before their discharge.

Finally, the Main Contractor relied on clause 1 of Part V of the sub-contract as contradicting paragraph (i) of the sale letter. Clause 1 of Part V of the sub-contract reads:

"1. *Stone Bund Work*

(i) The Sub-Contractor is required to be present at the inspection to be made by the Employer of any section of the sandfilled channel for the purpose of determining the level of the sandfilled channel for measuring the volume of stone-bund work to be executed. The final figures of the levels given by the Employer shall be binding on the Contractor and the Sub-Contractor for all purposes of this Sub-Contract."

Learned counsel for the Sub-Contractor observed that this part of the clause was plainly looking at something to the future rather than the original design volume on which the Main Contractor had placed so much reliance. He further contended that although the clause might be of some use in determining the quantities required, it clearly did not provide a method of measuring the stones.

We would now set out our conclusions. Having regard to the "measure and value" nature of the sub-contract, the context of the various conditions of the sub-contract which we have reviewed, the inevitable and unavoidable losses or wastage of stones due to the underwater nature of the dumping works we are of the view that paragraph (i) of the said letter was, for the reasons advanced by learned counsel for the Sub-Contractor, clearly intended to and did entitle the Sub-Contractor to be paid on the basis of measuring the Class A and Class B stones on the pontoons before their discharge into the areas designated for the building of the bunds. Accordingly, the Main Contractor failed in their submissions on this part of the appeal.

We would now consider the second question of law posed in this appeal. The Arbitrator had ruled that if the Sub-Contractor's submissions were correct in law it should be paid on the volume of cloth laid according to "shop drawings" issued by the Main Contractor to the Sub-Contractor. The High Court accepted the contentions of the Sub-Contractor. The Main Contractor in this appeal criticised the decision as wrong on the basis that these "shop drawings," which it had to issue to the Sub-Contractor because of the overdumping of the stones, were not the "contract drawings" within the meaning of clause 1(a)(3) and (b)(3) of Part I of the sub-contract. In response to these arguments, learned counsel for the Sub-Contractor again referred to the "measure and value" nature of the sub-contract under which work actually and properly done would be measured and valued according to the unit rates stated in the clauses mentioned earlier. In the sub-contract, both parties contemplated the wholly unavoidable wastage or losses due to displacement, sea wave action *etc.* and the "shop drawings" had to be issued by the Main Contractor. As a matter of fact, the Arbitrator had found that in laying the cloth, the Sub-Contractor had incurred "very minimal accidental loss." In the circumstances, learned counsel submitted that the "shop drawings" were instructions or directions issued by the Main Contractor to the Sub-Contractor on how and where to lay the filter cloth at the unit rates contained in the sub-contract under clause 1(iii) of Part III of the sub-contract the relevant parts of which read as follows:

"Variations

The Sub-Contractor shall make such variations of the Sub-Contract Works, whether by way of addition, modification or omission, as may be:

(i) ...

(ii) ...

(iii) ordered in writing by the Contractor

and no such variation shall in any way invalidate this Sub-Contract."

We accept the cogency of the reasons advanced by learned counsel for the Sub-Contractor and we therefore affirm the decision of the High Court as regards the second question.

The third question of law turns on the proper construction of clause 1(iii)(b) of Part V of the sub-contract which we had set out in full and which we had earlier referred to as the 'funny' clause. The phrase 'the designed area" is at the heart of the dispute. The Main Contractor insisted that this phrase must mean the design quantity or volume as calculated from the contract drawings and specifications. As the Arbitrator had found that the amount of filter cloth used in excess of 20 per cent over the designed area was 94,369.71 m^2 the Main Contractor claimed that the Sub-Contractor was obliged to pay it the sum of

$261,875.95, applying to the excess volume the unit price of $2.775 per m^2. On the other hand, the Sub-Contractor emphasised that the clause in question only referred to accidental loss and it had no application since the Arbitrator had found as a fact that there had been "very minimal accidental loss" of the filter cloth. Learned counsel finally submitted that the "designed area" must mean the area to be laid in the event and as provided for by the "shop drawings." We are persuaded by the submissions advanced on behalf of the Sub-Contractor and like the High Court we also answer the third question in favour of the Sub-Contractor.

Before we part with this judgment we must refer to a matter which the Main Contractor had specifically invited us to put right. One of the issues canvassed in the High Court, but which was no longer in contention before us, was whether the Main Contractor had accepted the conditions of the said letter of February 7, 1974, including paragraph (i) thereof. The Main Contractor felt that the following passage of the judgment of the High Court could be misunderstood as suggesting some fraud or wrongdoing on their part:

"In my opinion, the (Main Contractor) should have stated clearly during the negotiations the condition (i) in page 2 of the (Sub-Contractor's) letter of 7.2.74 regarding the measurement of Class A & B stones by pontoon loads was not acceptable to them, in which event the (Sub-Contractor) would no doubt have revised again their quotations contained in page 1 thereof to allow for losses due to overdumping, subsidence, wave action etc. By keeping quiet and giving the (Sub-Contractor) the impression that all the conditions in their letter of 7.2.74 were acceptable, the (Main Contractor) were, in fact, denying the (Sub-Contractor) an opportunity to revise again their quotations. The (Main Contractor) cannot now claim that they did not accept the conditions relating to pontoon loads measurements of Class A and B stones. I would be condoning a fraud on the (Sub-Contractor) if I accepted the (Main Contractor's) contention that they had not agreed that the Class A and B stones should be measured by the pontoon loads before discharge."

Learned counsel for the Main Contractor pointed out, and we accept, that no fraud or any form of deception was alleged against the Main Contractor at any stage of the proceedings. Any suggestion that the Main Contractor in contesting the issues raised in this appeal was guilty of any fraud or any attempted fraud was, in our view, wholly unwarranted. Seeing that the word "fraud" was expressed in a conditional manner we are of the view that the choice of the phrase was unfortunate and its use was intended to convey no more than that the case for the Sub-Contractor was so strong that to assert the contrary would be quite lacking in merit.

For the reasons given in this judgment, we would dismiss the appeal with costs. The security for the costs of the Sub-Contractor may be paid to the Sub-Contractor or its solicitors.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Yap & Yap.*

GOH GIN CHYE & ANOR. v. PECK TECK KIAN REALTY PTE. LTD. & ANOR.

[C.A. (Wee Chong Jin C.J., Thean & Coomaraswamy JJ.) April 9, 1987]

[Singapore – Civil Appeal No. 74 of 1983]

Landlord and Tenant – Whether "tenancy" or bare "licence" – Effect of agreements – Principles applied.

The first respondents are the owners of certain premises which were governed by the Control of Rent Act (Cap. 266). Their predecessors in title granted to one Tay Ping Kee, since deceased, a monthly tenancy of the ground floor of the premises at a certain rent.

The first respondents claimed vacant possession of the said premises on the grounds that the premises were sublet to the second respondent in breach of a covenant and that the subletting rent was in excess of the aggregate of 110% of the recoverable rent paid for the premises.

The claim was against the appellants who were the administrators of the estate of the deceased, Tay Ping Kee.

The parties relied on a series of agreements made between Tay Ping Kee and the appellants on the one hand and the second respondent on the other. It was not disputed that most of these agreements were expressed as "licence agreements."

The learned District Judge held that the first respondents were entitled to recover as against the appellants vacant possession of the said premises but he dismissed the claim against the second respondent. The appellants' appeal to the High Court was dismissed, and they appealed to the Court of Appeal.

Held, dismissing the appeal: (1) the intention of the parties is an important consideration in determining the relationship of landlord and tenant as in all other contractual relationships but in every case the intention "must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances." What the parties said or professed in the agreement alone is not enough; it does not alter what is, in effect, a tenancy into a licence, and *vice versa;*

(2) the relationship of the parties is determined by law,